

NO. 50922-9-II

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COURT OF APPEALS FOR DIVISION II

STATE OF WASHINGTON

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MANDON FOLEY,  
a married man

Appellant,

v.

JIM BAYS HOMES, LLC,  
A Washington limited liability company

Respondent.

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BRIEF OF RESPONDENT

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Klaus O. Snyder, WSB# 16195  
SNYDER LAW FIRM LLC  
15306 Main Street, E., Suite B  
Sumner WA 98390  
(253) 863-2889

Kelly J. Faust Sovar, WSB# 38250  
Kent WA

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## **I. INTRODUCTION**

After Appellant brought a frivolous bond claim, Respondent Jim Bays Homes, LLC ("Bays") moved to dismiss it on the grounds that Appellant was statutorily prohibited from bringing the bond claim. Appellant's attorney argued in briefing and in oral argument that Appellant's claim arose from a breach of contract which included improper work. The trial court found that the parties did not have a contract. As the record indicates, Appellant eventually conceded that the parties did not have a contract but began claiming that any member of the public that has a private action against a contract can bring a bond claim. Appellant's new position is the one he presents in this appeal.

Despite his attempts for this Court to review every order the trial court entered before it entered its final judgment awarding Bays its attorneys' fees and costs, Appellant appealed only the trial court's amended judgment dated September 15, 2017. Appellant assigned error to the trial court's Findings of Fact and Conclusions of Law, but failed to meet his burden that the record lacked support for the trial court's findings.

For the reasons set forth below, the trial court should be affirmed.

## II. STATEMENT OF THE CASE

**Facts.** Appellant and Respondent Austin Summers, LLC own neighboring real properties. CP 3, 13. Respondent Austin Summers, LLC hired Respondent general contractor Jim Bays Homes, LLC (“Bays”) to construct a single-family home on its real property. CP 3, 13.

Bays is a license and bonded contractor and has an Indemnity Agreement with its bonding company, Lexon Insurance Company (“Lexon”).<sup>1</sup> Pursuant to Bays Indemnity Agreement, Bays is contractually obligated to defend Lexon and is responsible for any incurred attorneys’ fees.<sup>2</sup>

**Procedural History. Initial Pleadings and Service.** After Bays completed a single-family home, Appellant provided Austin Summers, LLC and Bays’ counsel with an unfiled a Complaint<sup>3</sup> for Timer Trespass and Damages and Appellant included a claim against Bays’ bond.<sup>4</sup> CP 38. Despite Austin Summers, LLC and Bays’ counsel providing Appellant with statutory authority that the bond claim was improper, Appellant filed

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<sup>1</sup> See *Declaration of M. Jim Bays* filed 5-23-2017 and designated in the Supplemental Designation of Clerk’s Papers.

<sup>2</sup> *Id.*

<sup>3</sup> The unfiled Complaint is identical to the Complaint Appellant later filed. CP 1-8. In their Answer and Affirmative Defenses, Austin Summers, LLC and Bays deny the facts regarding the purported Timber Trespass as set forth in the Appellant’s opening brief. CP 12-17.

<sup>4</sup> The Complaint contained cut and paste mistakes. CP 5, FN1.

the Complaint. CP 38. Appellant plead that he properly brought the bond claim pursuant RCW 18.27 *et seq.* because he was “within the class of person intended to be protected by said bond”. CP 2, 7. Appellant asked the trial court to award his attorneys’ fees pursuant to applicable statutes. CP 8. Appellant prepared and submitted an Acceptance of Service for Austin Summers, LLC and Bays’ counsel, notably listing only Austin Summers, LLC and Bays as the represented parties. CP 35-36. Appellant did not serve the bonding company until March 29, 2017. CP 91, 96.

Austin Summers, LLC and Bays filed their Answer and Affirmative Defenses requesting attorneys’ fees and costs pursuant to the statutes Appellant asserted to be applicable. CP 17.

**Bays’ Motion to Dismiss.** Bays brought its Motion to Dismiss the Bond Claim and for Terms on March 17, 2017. CP 22-33. Appellant had not served the bonding company. CP 91, 96. Appellant’s response brief did not contain any pertinent facts.<sup>5</sup> CP 57-59. Appellant provided pertinent facts in response to Bays’ motion for the first time through his counsel at oral argument.

Appellant briefed that bonding company should not be dismissed since the express language in RCW 18.27.040 required the bonding

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<sup>5</sup> In what appears to be a cut and paste mistake, the facts listed in the brief are from an unrelated case.

company to pay judgments entered against the contractor for breach of contract. CP 61. Appellant asked the trial court to rely upon RCW 18.27.040's express language and the statutory intent to protect the public. CP 66. Appellant quoted the Washington Supreme Court's holding in *Stewart v. Hammond*, 78 Wash.2d 216, 219, 471 P.2d 90 (1970) which assumed that "the other contracting" party is part of the public Chapter 18.27 RCW sought to protect. CP 61.

Appellant briefed that he brought his bond claim based on law established by both the Legislature and the Washington Supreme Court. CP 59, 62. His counsel filed a declaration stating that Austin Summers, LLC and Bays' counsel did not provide his office with a case or controlling authority that his client's bond claim was unfounded. CP 69.

At oral argument, Appellant, once again, represented that he was within the class of people that could bring a bond claim and his counsel argued the bond will "pay all amounts that may be adjudged against the contractor by reason of breach of contract, including improper work." CP 168. Appellant's counsel clarified that it was the aforementioned improper work that fueled Appellant's bond claim. CP 169. When the trial court directly asked Appellant's counsel who Appellant contracted with, Appellant's counsel argued that Appellant "obviously" had a verbal or

written contract with Bays, then clarifying the parties had an oral contract.  
CP 169-171.<sup>6</sup>

When the trial court questioned further, Appellant began to backtrack stating that he did not believe a contract between the parties was needed. CP 171. Appellant never presented any evidence, by way of declaration or otherwise, that he found a statute or case law that allowed him to bring the bond claim. He argued only that he did not find case law that said he could not bring a bond claim. CP 167.

In responding to Bays' request for terms, Appellant's counsel continued to argue that, even without a contract, RCW 18.27.040(4) applied. CP 180. Despite properly quoting RCW 18.27.040(4)'s breach of contract requirement that could include improper work in his briefing and initially in oral argument, when Appellant's counsel began backtracking, he changed his tune and misquoted the statute to the trial court. *Id.* He argued that RCW 18.27.040(4) allowed bond claims in the case of negligent or improper work *or* breach of contract claims. *Id.*

After Bays' brought its Motion to Dismiss, and over a year after filing his Complaint, Appellant perfected service upon the bonding

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<sup>6</sup> A thorough review of the Transcript of Appellant's counsel's statements to the trial court (CP 168-171) is necessary to understand how the Appellant's representations, through his counsel, that there WAS an "oral contract" and that his client's claims included a claim for the Respondent breaching that contract established for the trial court that the Appellant was asserting facts that supported the trial court's award of attorney fees to the Respondent under the provisions of RCW 18.27.040(6).

company. CP 91, 96. Austin Summers, LLC and Bays' counsel, Klaus O. Snyder and attorney Paul Friedrich separately appeared on the bonding company's behalf. CP 84, 108-109.

The trial court granted Austin Summers, LLC and Bays' Motion to Dismiss based on RCW 18.27.040(4)'s clear language. CP 102-107. The trial court found that (notwithstanding Appellant's counsel's claims to the contrary) since Appellant lacked privity of contract with Bays, he was not within the class of people entitled to bring a bond claim. *Id.* Appellant did not include the trial court's order dismissing the bond claim in his Notice of Appeal.

The trial court refused to sanction Appellant for bringing a frivolous bond claim. *Id.* It found that Appellant had made novel arguments and did not find any clear authority that he could not bring the bond claim. CP 184.

**Bays' Motion for Reconsideration Re: Terms.** On April 27, 2017, Bays brought its Motion to Reconsideration. CP 111-123. When Appellant finally served the bonding company (after Bays brought its Motion to Dismiss) and began prosecuting the bond claim, he triggered RCW 18.27.040(6)'s applicability and Bays requested attorneys' fees pursuant to the bond claim statute. CP 119. Bays pointed out that Appellant continued to assert himself as a residential homeowner bringing

a breach of contract claim against Bays when he failed to serve the bonding company within a year of bringing his Complaint (as the statute extends the time a residential homeowner bringing a breach of contract claim can serve the bonding company to two (2) years). CP 120.

In Response to Bays' Motion, for the first time, Appellant asserted his "new" position and denied a breach of contract for improper work claim. CP 135-136<sup>7</sup>. The trial court denied Bays' Motion. CP 143.

**Bays' Motion for Attorneys' Fees and Costs Pursuant to RCW 18.27.040(6).** Bays brought a Motion for Attorneys' Fees. CP 145-191. Bays showed the trial court it was the prevailing party in the bond claim entitled to statutory attorneys' fees based on Appellant's briefing and oral argument regarding a breach of contract, including improper work and based on the fact that Appellant continued to assert himself as a residential homeowner bringing a breach of contract claim against Bays when he failed to serve the bonding company within a year of bringing his Complaint. CP 147-148, 237. Bays provided the trial court with detailed information as to the attorneys' fees it incurred, including the experience of each attorney that worked on its case. CP 231-243, 273. *See also Declaration of Counsel Re: Fees and Costs*, filed 4/17/2018 &

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<sup>7</sup> See also Footnote 6, *supra*.

*Supplemental Declaration of Counsel Re: Fees and Costs*, filed 4/18/2018, designated in the Supplemental Designation of Clerk's Papers.

On September 15, 2017, the trial court entered an Amended Order on Defendant's Motion for an Award of Attorney Fees and Costs Pursuant to RCW 18.27.040(6), including Findings of Fact and Conclusions of Law. CP 336-340.

Appellant filed a Notice of Appeal of only the September 15, 2017 Order. He did not provide the notice to attorney Paul Friedrich, who appeared on Lexon's behalf on April 25, 2017. CP 108-109.

**Appellant's Motion for Reconsideration.** Appellant moved to reconsider, continuing to take the new position that he didn't bring a bond claim based on a breach of contract. CP 211-216. As a result of the new position Appellant found himself in, he briefed that he could not maintain an action against the bonding company since he served the bonding company after the applicable statute of limitations. CP 216. The trial court denied Appellant's Motion. CP 271. The Appellant did not appeal the Order.

**Appellant's Motion for Revision Pursuant to CR 54(b).** On August 31, 2018, Appellant brought a motion for revision asking the trial court enter Bays' attorneys' fees award in the form of an order or, in the alternative, that the trial court revise the judgment to comply with CR

54(b) as a final judgment, so that he may appeal the Order “because there is no just reason for delay.” CP 297, 299.

In direct response to Appellant’s request to revise the judgment to comply with CR 54(b) so that Appellant could appeal it, Bays brought a **Motion to Amend Order Awarding Attorney Fees & Costs Pursuant to CR 54**. CP 302-305. Bays’ motion provided references to the court record confirming that the trial court’s initial order awarding Bays its attorneys’ fees was intended to be a final judgment. *Id.*

Appellant did another “about face” in responding to Bays’ Motion to Amend the Order. CP 311. Appellant abandoned his initial request that the trial court revise the judgment so he could appeal it and asked that the trial court clarify the judgment as being an order. *Id.* Appellant argued that, should he appeal, he did not expect to prevail and have the appellate court of appeals reverse or reduce the attorneys’ fees award (begging the question as to if he brought a frivolous appeal), but the attorneys’ fees award could offset the damages the arbitrator would award him, thereby potentially rendering the judgment moot.<sup>8</sup> CP 313. On September 15,

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<sup>8</sup> Appellant briefed: “Plaintiff Foley will likely have no need for an appeal of the Order (if it is certified as final), if he is fully compensated for its [sic] damages under its [sic] remaining claims...If Plaintiff Foley is compensated through the remaining claims and determines that no appeal is necessary, judicial economy is served by the avoidance of an unnecessary appeal....While certifying the Order as final probably will not delay the arbitration on the remaining claim, like the case in Nelbro Packing and as indicated above, the CR 54(b) certifications may complicate the proceedings and waste judicial

2017, the trial court denied Appellant's Motion for Revision. Appellant did not include the trial court's order denying his Motion for Revision to his Notice of Appeal.

### III. STANDARD OF REVIEW

#### A. Appellant timely appealed the trial court's September 15, 2017 Amended Order on *Defendant's Motion for an Award of Attorney Fees & Costs Pursuant to RCW 18.27.040(6)*.

The trial court's September 15, 2017 Order included Findings of Fact and Conclusions of Law. As the appellant confirmed in his opening brief, this Court (Division 2) set forth the proper standard of review when a party challenges a trial court's findings of fact and conclusions of law in *Hoover v. Warner*, 189 Wash.App. 509, 521 358 P.3d 1174 (2015) and in *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wash.App. 335, 341-42, 308 P.3d 791 (2013). In *Hoover*, this Court held that it reviews "a trial court's findings of fact for substantial evidence to support the findings and then determine whether those findings of fact support its conclusions of law."<sup>9</sup> It went on to define "substantial evidence" as the quantum of evidence "sufficient to persuade

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resources by encouraging an appeal of an Order that will not be necessary if Plaintiff Foley prevails on his other claims. CP 313.

<sup>9</sup> *Id.* (citing *Scott's Excavating Vancouver, LLC*, 176 Wash.App. at 341)

a rational fair-minded person the premise is true."<sup>10</sup> This Court makes all reasonable inferences from the facts in favor of the prevailing party.<sup>11</sup> The party challenging a finding of fact bears the burden of showing that the record does not support it.<sup>12</sup> The trial court's conclusions of law are reviewed de novo.<sup>13</sup> The appellate court will not disturb findings of fact supported by substantial evidence even if there is conflicting evidence.<sup>14</sup>

Appellant assigned error to five (5) of the trial court's findings of fact. Any reasonable inferences must be viewed in Bays' (as the prevailing party's) favor. Appellant cannot prevail absent a showing that the record does not support the findings of fact.

Appellant assigned error to (3) of the trial court's conclusions of law. The Court will determine if the findings of fact support the trial court's conclusions of law.

**The trial court awarded Bays its reasonable attorneys' fees and costs.** Appellant correctly cited *Berryman v. Metcalf*, 177 Wash.App. 644, 656-57, 312 P.3d 745 (Div. 1, 2013) for the well-established rule that an appellate court will uphold an attorney fee award absent a finding that the trial court manifestly abused its discretion.

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<sup>10</sup> *Hoover*, 189 Wash.App. at 521 (citation omitted); *See also Scott's Excavating Vancouver, LLC*, 176 Wash.App. at 341-342.

<sup>11</sup> *Hoover*, 189 Wash.App. at 521 (citing *Scott's Excavating Vancouver, LLC*, 176 Wash.App. at 342).

<sup>12</sup> *Scott's Excavating Vancouver, LLC*, 176 Wash.App. at 342

<sup>13</sup> *Id.*

<sup>14</sup> *Hoover*, 189 Wash.App. at 521 (citations omitted).

**B. Appellant did not timely appeal the trial court's Order of Dismissal, denial of his Motion for Reconsideration, denial of his Motion for Revision, or any other trial court order entered on or before September 15, 2017.**

RAP 2.4(b) reads in its entirety:

(b) Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if **(1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review. A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision. (Emphasis added).**

Washington courts hold that appealing a court's attorney fees award does not bring up for review the judgment on the merits.<sup>15</sup> In *Carrara, LLC*, Ron & E Enterprises, Inc. was awarded summary judgment against Carrara, LLC on July 8, 2005. Carrara, LLC had until August 8, 2005 (30 days) to appeal the summary judgment.<sup>16</sup> Carrara did not appeal until October 21, 2005, the date on which judgment was entered on attorney fees.<sup>17</sup> The *Carrara, LLC* court cited RAP 2.4(b) and found that

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<sup>15</sup> See e.g., *Ron & E Enterprises, Inc. v. Carrara, LLC*, 137 Wash.App. 822,826, 155 P.3d 161 (Div. 1, 2007).

<sup>16</sup> *Id.* at 824.

<sup>17</sup> *Id.*

because an appeal of attorney fees does not bring up for review a prior decision, Carrara's appeal of the summary judgment order was untimely.<sup>18</sup>

The *Carrara, LLC* court did an in-depth analysis of the RAPs regarding which trial court decisions can be reviewed. The *Carrara, LLC* court held:

RAP 2.2(a)(1) allows a party to appeal a final judgment of any proceedings, regardless of whether the judgment reserves for future determination an award of attorney fees or costs. This notice must be filed within 30 days after the entry of the decision of the trial court. RAP 5.2(a). RAP 2.4(b) allows a timely appeal of a trial court's attorneys' fees decision, but **makes clear that such an appeal does not allow a decision entered before the award of attorney fees to be reviewed (i.e. it does not bring up for review the judgment on the merits) unless timely notice of appeal was filed on that decision.** RAP 2.4(b); 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.4 at 183 (6th ed.2004). This clause, when adopted in 2002, was a change in the law and effectively overruled *Franz v. Lance*, 119 Wash.2d 780, 836 P.2d 832 (1992) (which allowed an appeal of sanctions to bring up an appeal from the underlying judgment). See 2A Tegland, *supra* at 183 (citing Drafter's Comment, 2002 Amendment). "The practical lesson is clear--counsel should appeal from the judgment on the merits, even if the issue of attorney fees is still pending." 2A Tegland, at 181.<sup>19</sup>

After the Appellant failed to provide his Notice of Appeal to attorney Paul Friedrich, who appeared on Lexon's behalf and after he omitted Lexon from his appellate brief caption. Appellant failed to

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 826.

provide any relevant case law allowing this court to review the trial court's prior decision. The only case law Appellant provided were decided after the RAP's were changed to specifically exclude this Court to review of the trial court's decisions before 2002. Additionally, he provided only part of RAP 2.4(b), omitting the portion of the rule that specifically states that an appeal of a decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable.

Pursuant to RAP 2.4(b)'s plain language and Washington case law interpreting the same, each of the trial court's order entered prior to September 15, 2017 were appealable and are not specifically not part of this review.

If this court were to review the trial court's prior decisions, the standard of review is as follows:

**The trial court's April 21, 2017 Findings of Fact and Conclusions of Law and Order on Defendant Jim Bays Homes, LLC's Motion to Dismiss and for Terms.** Appellant does not assign error to any of the trial court's findings. He raises an issue as to the trial court's bond claim dismissal. Bays' Motion to Dismiss is a Motion for Summary Judgment. Orders for summary judgment are reviewed de novo. Under CR 56(c), a court may grant summary judgment if the record presents no

genuine issue of material fact and the law entitles the moving party to judgment.<sup>20</sup> Such facts must move beyond mere speculative and argumentative assertions.<sup>21</sup>

**The trial court's order denying Mr. Foley's Motion for Reconsideration.** As Appellant confirmed the appellate court reviews a trial court's denial of a motion for reconsideration for abuse of discretion.<sup>22</sup> The Appellant set forth Washington's court's well-established position that an abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court.<sup>23</sup>

On page 15 of Appellant's Opening Brief, he indicates that his appeal necessarily implicates the trial court's denial of Bays' Motion for Reconsideration re: Terms. The standard of review for the trial court's May 22, 2017 Order Denying Defendant's Motion for Reconsideration is this standard of review (abuse of discretion).

#### **IV. LEGAL AUTHORITY AND ARGUMENT**

##### **A. The trial court correctly awarded Bays its attorneys' fees and costs pursuant to RCW 18.27.040(6).**

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<sup>20</sup> *Id.*

<sup>21</sup> *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wash.2d 602, 612-13, 62 P3d 470 (2003).

<sup>22</sup> *See e.g., Davies v. Holy Family Hosp.*, 144 Wash.App. 483, 498, 183 P.3d 283 (Div. 3, 1987).

<sup>23</sup> *Id.* (citations omitted).

The first issue Appellant addresses in his Opening Brief pertains to the trial court's first Conclusion of Law and should be reviewed de novo.<sup>24</sup>

A bond claim is a statutory claim made pursuant to RCW 18.27.040. RCW 18.27.040(6) entitles the prevailing party in a bond claim for breach of contract under a construction contract involving a residential homeowner to attorneys' fees and costs.

Statutory interpretation is a question of law, subject to de novo review.<sup>25</sup> The court's purpose when interpreting a statute is to discern and implement the intent of the legislature.<sup>26</sup> Where the meaning of statutory language is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent.<sup>27</sup> In discerning the plain meaning of a provision, the court considers the entire statute in which the provision is found as well as related statutes or other provisions in the same act that disclose legislative intent.<sup>28</sup>

The Washington Supreme Court discussed the statutory construction of RCW 18.27.040(6) in *Cosmopolitan Engineering Group, Inc.* The Court stated that the court must review the language of the

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<sup>24</sup> The trial court properly concluded that "[t]he Defendant Jim Bays Homes, LLC, as the prevailing party in the bond claim brought by Plaintiff against it, is entitled to an award of its attorney fees and costs pursuant to RCW 18.27.040(6)". CL #1 @ CP 339

<sup>25</sup> See e.g., *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wash.2d 292,298, 149 P.3d 666 (2006) (citation omitted).

<sup>26</sup> *Id.* (citations omitted).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citations omitted).

provision in question and found that RCW 18.27.040(6) refers to an action filed against the contractor and contractor's bond.<sup>29</sup> The Washington Supreme Court found this interpretation to be consistent with the statute's legislative history, which included an explanation that "[t]he prevailing parties in actions against bonds are permitted to recover attorneys' fees and costs."<sup>30</sup>

Appellant concedes that if he alleged a construction contract and a subsequent breach, the trial court could award attorneys' fees and costs pursuant to RCW 18.27.040(6).<sup>31</sup>

In his initial pleadings and the subsequent trial court motions, Appellant took a two-part position as to its stated bond claim. Initially Appellant claimed to be a member of the class of persons the statute intends to protect, acknowledging the statute does not afford protections to the general public. In his Complaint, Appellant cited RCW 18.27.040 and cited Chapter 18.27 RCW generally two (2) additional times. RCW 18.27.040(1) clearly states that bond claims can be brought only by the following class of persons/entities the statute intends to protect: those persons/entities who have (a) employee/laborer claims; (b) taxes/contributions due to the State of Washington; (c) subcontractor,

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<sup>29</sup> *Id.* at 299.

<sup>30</sup> *Id.* at 305, citing H.B. REP. on H.B. 1635 at 5 (referencing SUBSTITUTE H.B. 1635 § 3(6), 57th Leg. Reg. Sess. (Wash. 2001))

<sup>31</sup> See *Appellant's Opening Brief*, page 16.

material, and equipment claims and (d) breach of contract claims. Plaintiff could not allege that he is Bays' employee/laborer, that he is a taxing authority, or that he provided labor, materials, or equipment to Bays. The only possible way for Appellant to bring a bond claim would be if he were claiming a breach of contract.

When Bays moved to dismiss the bond claim, Appellant failed to set forth any facts in response to Bays' motion to dismiss. The only recitation of facts Appellant provided in response to Bays' motion was during oral argument. In oral argument Appellant's counsel stated that the parties "obviously" had a contract and argued that the trial court should consider the conversation between Bays' principal (Jim Bays) and Appellant as a verbal contract that met the contractual requirement.<sup>32</sup> Appellant then argued that if he was successful, he could recover his attorneys' fees and costs pursuant to the bond statute.<sup>33</sup>

Appellant briefed his argument as to why he believed the bond claim to be valid and stated that that he had brought the bond claim as a result of Bays' breach of contract including improper work in the conduct of the contracting business.<sup>34</sup> Appellant argued that his bond claim was reliant on the express language of RCW 18.27.040(1): "will pay all

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<sup>32</sup> CP 169-70.

<sup>33</sup> CP 181.

<sup>34</sup> CP 61. Appellant's counsel orally reiterated the argument at the hearing. CP 168-69.

persons furnishing material or renting or supplying equipment to the contractor and will “pay all amounts that may be adjudged against the contractor by reason of breach of contract including improper work in the conduct of the contracting business.”<sup>35</sup> Appellant argued that his bond claim was brought pursuant to established law and findings by the Legislature and the Washington Supreme Court.<sup>36</sup> Appellant quoted the Washington Supreme Court’s holding in *Stewart* in stating that “the other contracting party” was part of the public the statute sought to protect. Appellant briefed that the bond claim relied upon the express language of Chapter 18.27 RCW and the statutory intent.<sup>37</sup>

In addition to Appellant briefing and orally arguing that he had a contract with Bays, after Bays brought its motion to dismiss, Appellant served the bonding company with his lawsuit, taking advantage of the two (2) year statute of limitations available only to residential homeowners with breach of contract claims.

When Bays’ brought its motion to dismiss armed with the statute, Appellant gave every indication that he was alleging a bond claim as the result of a breach of a construction contract pursuant to RCW 18.27.040.

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<sup>35</sup> *Id.*

<sup>36</sup> CP 62. Appellant did not state that he was making a novel argument. After briefing his bond claim was brought according to well established law and RCW 18.27.040’s express language, he argued that Bays’ counsel didn’t provide him anything besides the statute to dispute the bond claim.

<sup>37</sup> CP 66.

When the trial court found that Appellant did not prove privity of contract with Bays, Appellant did an “about face”. For the first time, Appellant denied bringing the bond claim as the result of a breach of contract.

In his Complaint and then in response to Bays’ motion to dismiss, Appellant alleged he was bringing his bond claim pursuant to a breach of contract claim, including improper work resulting therefrom. According to his own understanding of the law as he set forth in his Opening Brief, if the Appellant, as a residential homeowner alleged a breach of construction contract as the basis for his bond claim, Bays, as the prevailing party in securing a dismissal of that action, was rightfully awarded the attorneys’ fees.

**B. The trial court properly summarily dismissed Appellant’s frivolous bond claim.**

- 1. Appellant is not in the class of persons that is permitted to bring a bond claim pursuant to Chapter 18.27 RCW when the Contractor Registration Act is read as a whole.**

In his opening brief, Appellant correctly sets forth the Washington Supreme Court’s holding in *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 11, 43 P.3d 4 (2002) that this Court must give effect to the plain meaning of RCW 18.27 *et seq* as an expression of legislative intent. As Appellant briefed, in *Campbell & Gwinn, LLC*, the Supreme Court

held that “plain meaning is derived from the context of the entire act...”

*Id.* at 11.

In *Campbell & Gwinn, LLC*, the Supreme Court discussed the plain meaning of a statute and its construction at length. The *Campbell & Gwinn, LLC* provided the following summary of its prior decisions as the formulation of the plain meaning rule:

“In *Estate of Lyons v. Sorenson*, 83 Wash.2d 105, 108, 515 P.2d 1293 (1973)...the court said that legislative intent is to be determined from what the Legislature said, if possible. The court then determined legislative intent from the “plain and unambiguous” language of a statute “in the context of the entire act” in which it appeared. *Id.*; see also *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash.2d 699, 708-09, 985 P.2d 262 (1999) (where statutory language is clear and unambiguous, its meaning is derived from its language alone; court construes an act as a whole, giving effect to all the language used, with related statutory provisions interpreted in relation to one another); *ITT Rayonier, Inc. v. Dalman*, 122 Wash.2d 801, 807, 863 P.2d 64 (1993) (a term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole; statutory provisions must be read in their entirety and construed together, not by piecemeal).”

146 Wash.2d at 10-11.

Appellant also relies upon *Jametsky v. Olsen*, 179 Wash.2d, 756, 317 P.3d 1003 (2014) for the proposition that remedial consumer protection statutes are to be liberally construed in favor of consumers. Aside from Appellant’s implicit admission that a person must be a consumer of the contractor’s services to bring a bond claim, the Supreme Court in *Jametsky* quoted *Campbell & Gwinn, LLC* in reaffirming the

holding that the statute's plain meaning must be derived from the entire act.<sup>38</sup> The *Jametsky* court then held that the statute should be liberally construed in favor of consumers.<sup>39</sup> The *Jametsky* court certainly did not hold that liberally construing a statute allows the court to disregard a specific statement or render any part of the act meaningless when the sections could otherwise be read together in harmony.<sup>40</sup>

Finally, Appellant cites the Washington Supreme Court decision in *Stewart v. Hammond*, 78 Wash.2d 216, 471 P.2d 90 (1970), which reiterates the statute's stated purpose as set forth in RCW 18.27.140. In *Stewart*, the contractor resided in Lewiston, Idaho and was not registered and bonded in the state of Washington.<sup>41</sup> The contractor entered into a contract with some folks from Washington.<sup>42</sup> When the homeowners did not pay the contractor, he filed a lien.<sup>43</sup> The sole issue before the *Stewart* court was whether the contractor's lack of registration precluded recovery.<sup>44</sup>

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<sup>38</sup> *Id.* at 763.

<sup>39</sup> *Id.* at 765.

<sup>40</sup> In addition to the plain language definitions that Appellant correctly provided in his briefing, the Appellant actually cites RCW 18.27.040 in its briefing, asking the Court to review and rely upon it. *Appellant's Opening Brief*, page 21.

<sup>41</sup> *Id.* at 218

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 219.

Interestingly, Appellant quotes the court's holding which combined both the Act's stated purpose and the contractual privity requirement:

The statute was designed for protection of the public. The overriding public policy must not be defeated by an attempt to accommodate one who has violated its specific provisions, albeit unwittingly. The law will be nullified if noncomplying contractors are permitted to evade the statute by a claim of 'unwitting violation' or 'undue loss' or by a claim **that the other contracting party** will be 'unduly enriched'. (Emphasis added).

*Stewart*, 78 Wn.2d at 220

The court's holding assumed the contractor and the homeowner had a contract. The *Stewart* court's holding was limited to whether the unregistered contractor could recover payment/maintain a lien foreclosure action against residential homeowners with whom he had a contract in light of the Act's stated purpose.

Two of Chapter 18.27 RCW's provisions are relevant: RCW 18.27.040(4)<sup>45</sup>, which lists the persons/entities that can bring a bond claim:

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<sup>45</sup> RCW 18.27.040(4) reads in its entirety: "The surety upon the bond shall not be liable in an aggregate amount in excess of the amount named in the bond nor for any monetary penalty assessed pursuant to this chapter for an infraction. The liability of the surety shall not cumulate where the bond has been renewed, continued, reinstated, reissued or otherwise extended. The surety upon the bond may, upon notice to the department and the parties, tender to the clerk of the court having jurisdiction of the action an amount equal to the claims thereunder or the amount of the bond less the amount of judgments, if any, previously satisfied therefrom and to the extent of such tender the surety upon the bond shall be exonerated but if the actions commenced and pending and provided to the department as required in subsection (3) of this section, at any one time exceed the

(a) Employee labor and claims of laborers, including employee benefits; (b) Claims for breach of contract by a party to the construction contract; (c) Registered or licensed subcontractors, material, and equipment; (d) Taxes and contributions due the state of Washington;

And RCW 18.27.140, which reads in its entirety:

It is the purpose of this chapter to afford protection to the public including all persons, firms, and corporations furnishing labor, materials, or equipment to a contractor from unreliable, fraudulent, financially irresponsible, or incompetent contractors.

As Appellant, and the case law he relies on confirms, RCW 18.27.040 and RCW 18.27.140 must be read together to give meaning to both statutory sections and plainly mean that, in addition to requiring contractors to be registered and bonded, by allowing the four (4) classes of people/legal entities to bring bond claims, the Legislature is protecting the public from unreliable, fraudulent, financially irresponsible, or incompetent contractors.

To read the statute any other way (i.e. to rely solely upon the statute's stated purpose, disregarding all of the other sections) is not only contrary to Appellant's own case law, it would render RCW 18.27.040 meaningless. It would effectively allow anyone to bring a bond claim

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amount of the bond then unimpaired, claims shall be satisfied from the bond in the following order: (a) Employee labor and claims of laborers, including employee benefits; (b) Claims for breach of contract by a party to the construction contract; (c) Registered or licensed subcontractors, material, and equipment; (d) Taxes and contributions due the state of Washington; (e) Any court costs, interest, and attorneys' fees plaintiff may be entitled to recover. The surety is not liable for any amount in excess of the penal limit of its bond."

against a contractor in any case unrelated to construction work, including debt collection for personal debts or personal injury cases involving a contractor. RCW 18.27.140 cannot be read in isolation to allow a person owning property neighboring a contractor's property to bring a bond claim over a dispute about which side of a property line a tree was on.

Appellant argues that RCW 18.27.040(4)(e) allows anyone who has ever brought a lawsuit against a contractor in the contractor's personal capacity and was awarded attorneys' fees, can recover those attorneys' fees from the bond in the form of a bond claim. He argues that if he proves that the owner of the neighboring property mistakenly directed the general contractor to cut down a tree on the other side of the property line, and the trial court awarded attorneys' fees in a subsequent lawsuit, the awarded attorneys' fees would be a basis for a bond claim. Appellant's position is not unlike the examples above. For example, according to Appellant, if a credit card company secured a personal judgment, including attorneys' fees, against a customer who happened to be a contractor by trade, under Appellant's theory, the credit card company would be entitled to bring a bond claim to recover the attorneys' fees.<sup>46</sup>

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<sup>46</sup> See also the statutory authority set forth in *Defendant Jim Bays, LLC's Motion for Reconsideration* that precludes Appellant's claims of "tortious injury to real property" from recovery against the Respondent's surety bond – specifically RCW 19.72.107. CP 118-119.

Besides the impracticality of Appellant's position, the plain meaning of the Contractor Registration Act ("CRA"), and of 18.27.040(4)(e) specifically, renders it impossible. RCW 18.27.040(3) provides the process for a person, firm, or corporation to bring a bond claim/lawsuit for any of the items in [the] section. The person, firm, or corporation is the plaintiff referenced in RCW 18.27.040(4) references is the person, firm, or corporation having a potential bond claim.

- 2. Appellant admitted that if he is not a residential homeowner alleging a breach of contract claim, the statute of limitations has expired on his bond claim.**

RCW 18.27.040(3) reads in relevant part:

(3) ...Action upon the bond or deposit brought by a residential homeowner for breach of contract by a party to the construction contract shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within two years from the date the claimed contract work was substantially completed or abandoned, whichever occurred first. Action upon the bond or deposit brought by any other authorized party shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within one year from the date the claimed labor was performed and benefits accrued, taxes and contributions owing the state of Washington became due, materials and equipment were furnished, or the claimed contract work was substantially completed or abandoned, whichever occurred first.

In his Motion for Reconsideration, when Appellant began arguing that he did not bring the bond claim as a residential homeowner with a breach of contract claim, he acknowledged that he did not serve the

bonding company within a year of filing the summons and complaint. He stated that the bond claim could be dismissed on the basis that he failed to serve the bonding company within the one (1) year statute of limitations. CP 216.

The trial court correctly dismissed the bond claim on the grounds that Appellant was statutorily prohibited from bringing the claim. But even if that wasn't the case, Appellant's request for review of the dismissal is moot. Appellant admits that he cannot maintain a bond claim even pursuant to his "new" position that he didn't allege a breach of contract claim as the one year statute of limitations to serve the bonding company expired on March 24, 2017.

### **3. Appellant brought a frivolous bond claim.**

The purpose of RCW 4.84.185<sup>47</sup> is to "discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and

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<sup>47</sup> RCW 4.84.185 reads in relevant part: In any civil action, the court having jurisdiction may, upon written findings by the judge that the action...was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action... **This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause...**The provisions of this section apply unless otherwise specifically provided by statute. (Emphasis added).

expenses incurred in fighting meritless cases."<sup>48</sup> A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts.<sup>49</sup>

CR 11<sup>50</sup> addresses two types of problems relating to pleadings, motions and legal memoranda: filings which are not well grounded in fact and warranted by law and filings interposed for any improper purpose.<sup>51</sup> Where an action is not supported by any rational argument based on the law or the facts, it is an abuse of discretion not to award attorney's fees

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<sup>48</sup> *Kearney v. Kearney*, 95 Wn. App. 405, 416, 974 P.2d 872 (1999) (quoting *Biggs v. Vail*, 119 Wn.2d at 137, 830 P.2d 350 (1992)).

<sup>49</sup> *Forester v. Pierce County*, 99 Wn. App. 168, 183, 91 P.2d 687 (2000). See also *Clarke v. Equinox Holdings, Ltd.*, 56 Wash.App 125, 132, 783 P.2d 82 (1989) (Claims are frivolous if Plaintiffs cannot support their claims on summary judgment.)

<sup>50</sup> CR 11 (a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address... The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee. (Emphasis added)

<sup>51</sup> *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 217, 829 P.2d 1099 (1992).

under RCW 4.84.185 and CR 11.<sup>52</sup> When a court makes a finding that a violation of CR 11 has occurred, imposition of CR 11 sanctions is mandatory.<sup>53</sup>

As the relevant trial court pleadings reflect, both parties agree that the Washington Supreme Court's decision in *Bryant v. Joseph Tree, Inc.* is controlling in this case. *Bryant* sets the standard that should be applied in evaluating a prevailing party's request to award terms pursuant to CR 11 and RCW 4.84.185. As in *Bryant*, the issue before this Court is CR 11's provision requiring pleadings to be well-grounded in fact and warranted by law.<sup>54</sup> CR 11 imposes requirements on attorneys who sign and file any "pleading, motion, or legal memorandum". A complaint is a "pleading". An attorney who signs and files a complaint must therefore comply with CR 11's requirements.<sup>55</sup>

The reasonableness of an attorney's inquiry is evaluated by an objective standard.<sup>56</sup> The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be

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<sup>52</sup> See, *Deja Vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 263-64, 21 979 P.2d 464 (1999).

<sup>53</sup> *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 110, 70 P.2d 853 (1989) (citing *Miller v. Badgley*, 51 Wash.App. 285, 301, 753 P.2d 530 (1988))

<sup>54</sup> *Bryant*, 119 Wash.2d at 217.

<sup>55</sup> *Id.* At 218.

<sup>56</sup> *Id.* At 220 (citations omitted).

factually and legally justified.<sup>57</sup> In making this determination, the court may consider such factors as: the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.<sup>58</sup>

Appellant cannot dispute that, in order for his counsel to sign the Complaint containing the bond claim, the bond claim needed to be well grounded in fact and warranted by law. CR 11 required Appellant's attorney to 'stop, think and investigate more carefully before serving and filing papers.'<sup>59</sup>

When Appellant, through his counsel, Mr. Ahrens, brought the bond claim and responded to Bays' Motion to Dismiss and for Terms, Mr. Ahrens appeared to understand the CRA. He provided the trial court with statutory language requiring the appellant to have a contract with Bays in order to bring a bond claim. He requested the trial court rely upon RCW 18.27.040 's express language and the statutory intent stated in RCW 18.27.140. He provided the trial court with a Washington Supreme Court

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<sup>57</sup> *Id.* (citing *Spokane & Inland Empire Blood Bank*, 55 Wash.App. at 111, **780 P.2d 853** (quoting *Cañell v. Petty*, **810 F.2d 463**, 466 (4th Cir.1987))).

<sup>58</sup> *Id.* At 220-221.

<sup>59</sup> See *Bryant v. Joseph Tree, Inc.* 119 Wash.2d 210, 829 P.2d 1099 (citing Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983)).

holding that assumed that the party that had a construction project with the contractor was part of the public the CRA permitted to bring a bond claim. Mr. Ahrens repeatedly briefed that the appellant's bond claim was based on established law. At oral argument, Mr. Ahrens initially acknowledged the statutory contractual requirement and asserted that the conversation between neighbors was "obviously" an (oral) contract.

Despite Mr. Ahrens' understanding of the CRA, he did not seem to understand his duty to verify the appellant's bond claim was warranted by well-grounded facts and law. Instead of providing evidence that he had investigated the facts and law surrounding the appellant's bond claim, Mr. Ahrens submitted a declaration wherein he stated that Bays' counsel had not provided him any case law or authority that he could not bring the claim (completely disregarding that Mr. Snyder had provided him the very statutory authority the trial court relied upon when it dismissed the bond claim).

Only when the trial court pointed out that the neighborly conversation between neighbors was not a contract did Mr. Ahrens "change his tune". After he misquoted RCW 18.27.040(4), he began arguing that a construction contract was not required. He told the court he did not find legal authority that he could not bring the bond claim.

The trial court's denial of terms based on Mr. Ahren's representations that he did not find any legal authority that he could not bring the bond claim is a misapplication of the CR 11 standard. Mr. Ahrens' had a duty to investigate the appellant's bond claim before he brought it. Mr. Ahrens had a duty to verify the claim was well-grounded in fact and law.

During summary judgment, Mr. Ahrens treated the facts of the case as fluid, first arguing the neighboring property owners "obviously" had a contract and then arguing they did not, but it was not needed. Mr. Ahrens signed the Complaint and Response to Motion to Dismiss, both full of obvious cut and paste mistakes, indicating little to no time initially spent on the bond claim.

Mr. Ahrens also treated the well-established and clear statutory law governing bond claims as fluid. He correctly quoted the CRA's breach of contract requirement to the trial court until it became clear that he would not prevail in that aspect. Just minutes after he properly quoted RCW 18.27.040(4) to the trial court, Mr. Ahrens misquoted it, trying to distract the trial court from the statute's breach of contract requirement.

Notably, Mr. Ahrens never argued that he was presenting novel arguments. He argued only that existing law and the CRA's plain language allowed the appellant's bond claim. His fluid approach to the

law, notwithstanding, ultimately the facts of his case did not support a bond claim.

Mr. Ahrens had a duty to verify the bond claim before he brought it. His duty pursuant to CR 11 is to bring claims that are warranted by existing law. He was required to find legal authority that allowed him to bring the bond claim.

The trial court should have sanctioned Appellant for bringing a frivolous bond claim and awarded Bays' terms for having to defend against it. It abused its discretion when it denied Bays' Motion for Reconsideration Re: Terms.

After the trial court denied Bays' Motion for Reconsideration, Appellant confirmed that he brought a frivolous bond claim. He pointed out to the trial court that, under his "new" position that he was not alleged a breach of contract claim, since he did not serve the bonding company within a year, the statute of limitations had expired on his bond claim. Appellant's admission supports Bays' position that Appellant brought a frivolous bond claim and it also supports a finding that Appellant's request for review of this issue is moot and frivolous. If this Court reversed the trial court and remanded the bond claim, as Appellant could not continue to prosecute the bond claim pursuant to CR 11 and RCW 4.84.185 as he knows that a bond claim would not be well grounded in fact and warranted

by law. If he did pursue the bond claim upon remand, Appellant admits the trial court would be right to dismiss the bond claim on other grounds.

**C. The trial court properly awarded Bays its reasonable attorneys' fees and costs.**

Appellant raised the issue as to the reasonableness of Bays' attorneys' fees award. The issue addresses the trial court's first and second Findings of Fact and first and second Conclusions of Law.

As long as the record provides substantial evidence to support the trial court's Finding of Fact and the Finding of Fact supports the Conclusion of Law, the appellate court shouldn't overturn the trial court. Appellant, as the party challenging the Finding of Fact, has the burden to show that the record does not support it. Appellants must meet his burden of proof while making all reasonable inferences in favor of Bays, the prevailing party.

Appellant failed to meet his burden. Appellant did not make a single statement of fact or argument that the trial court's Finding of Fact was not supported by the record. Appellant did not make a single statement of fact or argument that the Finding of Fact did not support the Conclusion of Law. Appellant merely stated that the trial court made an error and then cut and pasted its trial court brief, changing only a few words.

**1. The record provides substantial evidence that Bays is the prevailing party in the bond claim and the trial court's Findings of Fact supports its Conclusions of Law.**

A party prevails when it succeeds on any significant issue, which achieves some benefit the party sought.<sup>60</sup> Bays defended Lexon pursuant to their Indemnity Agreement. Bays was legally responsible for Lexon's attorneys' fees and costs.<sup>61</sup> Bays successfully defended Lexon against Appellant's bond claim and is the prevailing party in the bond claim. For purposes of the attorneys' fee award, Bays is "in Lexon's shoes". The trial court's record contains the Declaration of M. Jim Bays which confirms Bays' defense of Lexon pursuant to their Indemnity Agreement.

Appellant's argument relies upon *Cosmopolitan Eng'g Grp., Inc.*, which certainly applies to this case, but it does not stand for Plaintiff's assertion that Bays cannot recover attorneys' fees from Appellant after successfully defending both itself and Lexon against Appellant's bond claim.

Cosmopolitan Engineering Group, Inc. performed engineering services for a contractor and some additional work directly for the owner.<sup>62</sup> After Cosmopolitan Engineering Group, Inc. was not paid for its services, it sought to recover the unpaid fees by asserting multiple claims,

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<sup>60</sup> *Blair v. Washington State University*, 108 Wash.2d 558, 572, 740 P.2d 1379 (1987)

<sup>61</sup> See e.g., *Jones v. Strom Const Co., Inc.*, 84 Wash.2d 518, 523, 527 P.2d 1115 (1974)

<sup>62</sup> *Cosmopolitan Engineering Group, Inc.*, 159 Wash.2d at 294

including a bond claim.<sup>63</sup> Cosmopolitan Engineering Group, Inc.'s breach of contract and equitable claims against the contractor and its bond to proceeded to trial.<sup>64</sup> After Cosmopolitan Engineering Group, Inc. prevailed at trial, it appealed, raising several issues, including a challenge to the trial court's conclusion that attorney fees authorized under RCW 18.27.040(6) are limited to recovery against the contractor's surety bond.<sup>65</sup> The issue before the Washington Supreme Court was to review the Court of Appeals decision that given the plain language of RCW 18.27.040(6), the express purpose of the contractor's registration statute, and case law describing the statute as comprehensive, a prevailing party under this provision is entitled to attorney fees against both the opposing contractor and its bond.<sup>66</sup> The Washington Supreme Court reversed the Court of Appeals and held that considering RCW 18.27.040 in its entirety, subsection (6) of that statute was intended to authorize attorney fees for the prevailing party only in actions against a contractor's bond.<sup>67</sup>

Bays is seeking to recover attorneys' fees incurred in defending against Plaintiff's bond claim. Bays, in defending itself and its surety, Lexon pursuant to their Indemnity Agreement, is the prevailing party in

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<sup>63</sup> *Id.* at 295.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 296.

<sup>66</sup> *Id.* at 298.

<sup>67</sup> *Id.* at 306.

Plaintiff's bond claim and, according to *Cosmopolitan*, entitled to attorneys' fees.

2. The record provides substantial evidence that that the trial court awarded Bays its reasonable attorneys' fees and the trial court's Finding of Fact supports its Conclusion of Law.

a. Appellant commenced his bond claim on March 23, 2016.

RCW 18.27.040(6) reads in relevant part:

(6) The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees.

RCW 18.27.040(3) states that an "[a]ction upon the bond...brought by a residential homeowner for breach of contract by a party to the construction contract shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within two years from the date the claimed contract work was substantially completed or abandoned, whichever occurred first."<sup>68</sup> RCW 18.27.040(3) is consistent with Washington's statute on civil procedure stating that an action is commenced by service of summons, or by the filing of a

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<sup>68</sup> (Emphasis added) RCW 18.27.040(3) provides the service of process requirements that a plaintiff bringing a bond claim must follow to perfect his claim but the statute is clear that the bond claim begins when the plaintiff files the summons and complaint.

complaint, or as otherwise provided.<sup>69</sup> Plaintiff filed his bond claim on March 23, 2016. According to the plain language of the statute, Plaintiff commenced his bond claim on March 23, 2016.

Washington courts hold that attorneys' fees awards include the amount of fees a party actually spent responding to the lawsuit filed against it, even if those attorneys' fees were incurred before the plaintiff filed the lawsuit.<sup>70</sup> Washington courts recognize that attorney fee requests routinely include time records showing how much time and what costs were incurred from the attorney's first contact with a litigant.<sup>71</sup> The court rules require such pre-filing preparation and it is a necessary and legitimate part of a judicial proceeding.<sup>72</sup> An attorneys' fees award should include the attorneys' fees a party incurred in obtaining the successful result.<sup>73</sup>

Bays began defending Lexon pursuant to their Indemnity Agreement and establishing its defense in December 2015, three (3) months before Appellant commenced his bond claim. Not only does Washington courts find such preparation necessary, Mr. Ahrens stated an expectation that Bays' counsel was working on the bond claim when he

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<sup>69</sup> RCW 4.28.020

<sup>70</sup> See e.g., *Madden v. Foley*, 83 Wash.App. 385, 391, 922 P.2d 1364 (Div. 1, 1996).

<sup>71</sup> See e.g., *Dice v. City of Montesano*, 131 Wash.App. 675 692-693, 128 P.3d 1253 (Div. 2, 2006)

<sup>72</sup> *Id.* at 693.

<sup>73</sup> See e.g., *Collings v. City First Mortg. Services, LLC*, 117 Wash.App. 908, 928, 317 P.3d 1047 (Div. 1, 2013)

stated in his declaration that he asked Bays' counsel to provide him with a case or controlling authority that Appellant's bond claim was barred. Bays' attorney fee award should include all its attorneys' fees incurred from the time it began to establish its successful defense.

Appellant failed to provide any legal authority for its self-serving and conclusory statement that Bays could not incur attorneys' fees for defending Lexon pursuant to their Indemnity Agreement before counsel appeared for Lexon. Where no authorities are cited in support of a proposition, the court may assume that counsel, after diligent search, has found none.<sup>74</sup> Appellant's position is contrary to well established case law and its own conduct.

**b. The trial court awarded Bays attorneys' fees related only to its counsel's work on the bond claim.**

Appellant cites "court record generally" in its statement of the majority of the fees the trial court incurred were not in defense of the bond. Appellant could not specifically cite to the court record because his statement is not reflective of the court record. While he made multiple objections to the trial court as to Bays' counsel's timeslips, that the incurred attorneys' fees were unrelated to the bond claim were not one of them.

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<sup>74</sup> *DeHeer v. Seattle Post-Intelligencer*, 60 Wash.2d 122, 126, 372 P.2d 193 (1962).

As this court can see from the three (3) declarations of counsel that the trial court had before it when determining Bays' attorneys' fees award, the record contains substantial evidence that Bays claimed only those attorneys' fees it incurred in defending Lexon in the bond claim.

**c. The record contains substantial evidence that Bays' single unsuccessful claim cannot be separated from the rest of his successful claims.**

Where attorney fees for successful and unsuccessful claims are inseparable, the trial court may award a party all of its fees.<sup>75</sup> Where the party's claims involve a common core of facts and related legal theories a party who has won substantial relief should not have its fees reduced simply because the trial court did not adopt each contention raised.<sup>76</sup>

While the trial court did not award Bays terms after Appellant brought a frivolous bond claim, Bays' arguments regarding Appellant's frivolous bond claims were addressed in its Motion to Dismiss and its Motion for Reconsideration. All related briefs addressed other issues, including the CRA, Appellant's inability to maintain a bond claim pursuant to the CRA, and Bays' award of attorneys' fees under the CRA. Bays' frivolous bond claim arguments were just one of many arguments made and cannot be separated from Bays' remaining arguments-all of

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<sup>75</sup> See e.g., *Bloor v Fitz*, 143 Wash.App. 718, 848, 180 P.3d 805 (Div. 2, 2008) (citing *Blair*, 108 Wash.2d at 572).

<sup>76</sup> See e.g., *Martinez v. City of Tacoma*, 81 Wash.App. 228, 243, 914 P.2d 86 (1996).

which were successful. Washington courts do not require each and every one of Bays' arguments to be adopted for it to recover all of its fees.

Appellant recognizes that Bays' single unsuccessful claim cannot be separated from all of the remaining successful claims its briefing contained. Appellant does not provide a single authority or citation that would support a deviation from the recognized case law which states that Bays can recover all of its attorneys' fees since its single unsuccessful argument cannot be separated out from all of its remaining successful arguments.

Appellant correctly relies upon *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 675 P.2d 193 (1983) for evaluating the number of hours reasonably expended in an attorneys' fee award. The *Bowers* court held that "[t]he trial court must determine the number of hours reasonably expended in the litigation.<sup>77</sup> To this end, the attorneys must provide reasonable documentation of the work performed.<sup>78</sup> This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.).<sup>79</sup> While Appellant implies that Bays' counsel's

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<sup>77</sup> *Id.* at 597.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

documentation is insufficient, it is undisputed that it easily meets the standard set forth in Appellant's own case law.

The trial court had substantial evidence that it was awarding reasonable fees for Bays' attorneys' fees it incurred based on his counsel's contract attorney's work. The trial court reviewed Bays' counsel's declaration which provided that he had worked with his contract attorney for more than ten (10) years in Pierce County and that her hourly rate was reasonable given the locale of her practice and her experience.

Appellant includes a list of attorneys' fees Bays incurred that he argues should not be included in the fee award. He does not state why each entry should not be included, arguing instead that they should be excluded based on the "above standards". The trial court had substantial evidence to support its attorneys' fees award as reasonable under the lodestar method, including those listed below which Appellant raised as issues, listed below were reasonable.

The 12/23/2015, 1/11/2016, & 3/29/2016 entries are Bays' counsel's review of initial pleadings and answering the same. The second entry specifically details Bays' counsel's attempts to have Appellant dismiss his bond claim instead of forcing both parties to incur fees to get the bond claim dismissed. Bays would not be able to successfully defend against Appellant's bond claim without reviewing the claim and

answering it. Bays' counsel made a good faith effort to keep both parties from incurring fees in litigating Appellant's bond claims.

The 3/15/2016, 3/17/2016, 4/12/2017, 4/13/2017, & 4/17/2017 entries are the drafting and filing of Bays' Motion to Dismiss Appellant's Bond Claim, Bays' Reply, and related pleadings. Bays' prevailed in that Motion and its argument that the bond claim was frivolous was among other successful arguments and cannot be separated.

The 4/10/2017 entry reflects the preparation of Bays' Motion to Amend Answer to add a counterclaim for damage to Bays' business expectancy was done as a result of Appellant filing a wrongful bond claim. Bays' counsel decided to incorporate his work on the Motion to Amend into the ongoing Motion to Dismiss.

The 5/23/2017 – 6/29/2017 entries all pertain to Bays' Motion for Attorneys' Fees in which Bays prevailed.

**D. The trial court properly certified the Amended Order on Fees Pursuant to CR 54(b).**

- 1. The record provides substantial evidence that the bond claim was separate and distinct and that there was no just reason for delay in entering the final judgment and the trial court's Findings of Fact supports its Conclusions of Law.**

Again, Appellant failed to meet his burden of proof that the record does not support the trial court's findings of fact that the bond claim was separate and distinct and that there was no just reason for delay.

Appellant, again, did not even attempt to meet his burden. Instead, he cut and pasted his trial court brief into his opening brief.

After asking the trial court to revise Bays' attorneys' fees award to become a final judgment pursuant to CR 54(b) so that he could appeal it because there is no just delay, Appellant argued that the bond claim itself had no bearing upon or relationship to the remaining claims.<sup>80</sup> He stated that separating the bond claim from the underlying claims would not affect the underlying claims, but he was hoping for an arbitration award that would offset the judgment amount.

Appellant's representation to the trial court supported the trial court finding that the bond claim was separate and distinct and having no relationship between the wrongfully filed bond claim action and Plaintiff's remaining claims; that the bond claim action was no longer before the trial court; that the arbitration would not moot review of the bond claim; that his seeking to offset damages was not a valid development in the trial court; that the bond claim review would not delay the underlying arbitration; that there would be no ill effects from Appellant seeking review of the bond claim; and that there was no just delay for delaying entry of the Order as a Final Judgment.

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<sup>80</sup> CP 297, 299, 313

Appellant's arguments to the trial court support the trial court's findings of fact. The trial court entered the revised judgment as Appellant requested after he represented that there was no just reason for delay. Appellant provided multiple arguments that the bond claim was a separate claim with no bearing on the underlying claims, but he was hoping that his arbitration award would offset the attorneys' fees he owed Bays. The record according to Appellant supports every Finding of Fact that he later assigned error to.

The trial court's findings of fact support its Conclusion of Law that, pursuant to CR 54(b), there is no just reason for delay in the entry of this Order as a Final Judgment. The trial court's entry of the amended judgment and the corresponding Conclusion of Law is exactly the action Appellant asked the trial court to take when he brought his Motion for Revision, representing to the trial court that there was no just reason for delay in the entry as a Final Judgment so that he could appeal the judgment.

**2. The Amended Judgment in favor of Bays awarding it its attorneys' fees and costs is a final judgment.**

Surprisingly, after asking the trial court to revise its order to comply with CR 54(b) and representing to the trial court that there was no just reason in delaying enter of the trial court's order as a final judgment,

Appellant argues to this Court that the trial court should not have certified it. Appellant then cites *Nelbro Packing Co. v. Baypack Fisheries LLC*, 101 Wash.App. 517, 6 P.3d 22 (Div. 1, 2000). The *Nelbro Packing* court held that if a trial court erroneously certifies a judgment, the appellate court should dismiss the appeal. *Id.* at 521.

While Bays does not oppose this Court dismissing this appeal, the trial court's September 15, 2017 Amended Judgment was a final judgment and the trial court properly certified it.

Appellant relies heavily upon *Nelbro Packing*. In *Nelbro Packing*, wherein the plaintiff was attempting to avoid liability on a loan based on several theories/separate claims.<sup>81</sup> After a series of procedural maneuvers, including a motion to dismiss based on *forum non conveniens* grounds and a subsequent appeal, both King County Superior Court and a trial court in Alaska were deciding the same sets of claims between two parties and rendering inconsistent rulings.<sup>82</sup> King County Superior Court dismissed some of plaintiff's claims on summary judgment, finding that they did not absolve it of liability on the loan.<sup>83</sup> The trial court certified the summary judgment orders pursuant to CR 54(b).<sup>84</sup>

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<sup>81</sup> *Id.* at 520.

<sup>82</sup> *Id.* at 520-21.

<sup>83</sup> *Id.* at 520.

<sup>84</sup> *Id.*

The *Nelbro Packing* court began its analysis holding that since the dismissed claims could have been enforced separately from the remaining claims, the trial court correctly concluded the claims were separable.<sup>85</sup>

The *Nelbro Packing* court turned its analysis as to whether the trial court abused its discretion finding there was no just reason for delay.<sup>86</sup> The *Nelbro Packing* court held that a court abuses its discretion if the decision was manifestly unreasonable, or the discretion was exercised on untenable grounds or for untenable reasons.<sup>87</sup> Substantial deference is given to the trial court's judgment. The *Nelbro Packing* court proceeding to list the factors relevant to the determination whether there is no just reason for delay include:

(1) [T]he relationship between the adjudicated and the unadjudicated claims, (2) whether questions which would be reviewed on appeal are still before the trial court for determination in the unadjudicated portion of the case, (3) whether it is likely that the need for review may be mooted by future developments in the trial court, (4) whether an immediate appeal will delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial, and (5) the practical effects of allowing an immediate appeal.<sup>88</sup>

The *Nelbro Packing* court noted that the complicated fact pattern before it was an exception, instead of the rule, and held that resolving discrete legal issues will generally streamline litigation and, therefore, the

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<sup>85</sup> *Id.* at 525.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

trial court should certify discrete legal issues.<sup>89</sup> The *Nelbro Packing* court went on to explain that the trial court's written findings did not reflect whether the trial court considered how certifying the orders may complicate the case.<sup>90</sup> Ultimately the *Nelbro Packing* court found that the trial court should not have certified the orders and dismissed the appeal.<sup>91</sup>

*Nelbro Packing* is easily distinguishable from the instant case. While two jurisdictions were conducting simultaneous reviews of the same issues in *Nelbro Packing*, the bond claim has been before only one court at a time. More importantly, the trial court specifically considered the factors the *Nelbro Packing* court listed and incorporated them into its order.

Appellant specifically takes issue with only one factor the *Nelbro Packing* court set forth and that the trial court considered: whether the need for review is likely to be mooted by future developments in the trial court. The *Nelbro Packing* court instructed that substantial deference is given to the trial court's judgment that action on Appellant's remaining claims would not moot the review of the bond claim. The trial court rejected Appellant's argument that this factor could be satisfied on the grounds he was hoping that his arbitration award would offset Bays'

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<sup>89</sup> *Id.* at 531.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 533.

judgment against him. Appellant appeared to base his argument on the *Nelbro Packing*'s court finding that the appeal before it would be mooted by the underlying claims.

When the *Nelbro Packing* court analyzed the factors, it recognized that, though the plaintiff was unable to avoid liability for its loans in summary judgment, if the plaintiff were otherwise able to avoid its liability based on the remaining claims, it was unlikely the plaintiff would pursue an appeal.<sup>92</sup> In other words, the *Nelbro Packing* court recognized that the plaintiff could achieve its desired outcome through the remaining claims, therefore mooting the claims on appeal. That is distinguishable from Appellant's implicit admission that, though he does not expect to prevail on appeal, he pursued the appeal in hopes that his arbitration award will offset the judgment against him. Appellant cannot receive the same outcome from this appeal and the underlying claims the parties arbitrated. Appellant's bond claim was not mooted by the arbitration.

The trial court proved to be correct in its holding that the remaining claims would not moot the review of the bond claim. The parties arbitrated Appellant's remaining claims on August 14, 2018 and this review of the trial court's final judgment on the bond claim is not

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<sup>92</sup> *Id.* at 529.

moot. Along those same lines, as Appellant anticipated in his briefing, his appeal did not delay the parties arbitrating the remaining claims.<sup>93</sup>

#### **E. Bays is entitled to attorneys' fees on appeal**

RAP 18.1 & RAP 14.2 provide that the prevailing party is entitled to the attorneys' fees and costs that it incurred on appeal, if it was so entitled at the trial court level. Pursuant to RCW 18.27.040(6), CR 11, and RCW 4.84.185, and the case law discussed above, Bays is entitled to its attorney's fees and costs that it incurred in this appeal.

### **V. CONCLUSION**

The trial court properly awarded Bays its attorneys' fees and costs pursuant to RCW 18.27.040(6) after dismissing Appellant's frivolous bond claim.

Furthermore, based on the Appellant's own case law as cited in his Opening Brief, this court "*may affirm on any grounds supported by the record*"<sup>94</sup>. As such, if this Court does not find that the attorney fees and costs award to Respondent based on RCW 18.27.040(6) was properly granted, then the Respondent urges and request that this court find that

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<sup>93</sup> On page 39 of Appellant's Opening Brief, Appellant reiterated his trial court argument that "[w]hile certifying the Order as final probably will not delay the arbitration on the remaining claim, like the case in Nelbro Packing and as indicated above, the CR 54(b) certifications may complicate the proceedings and waste judicial resources by encouraging an appeal of an Order that will not be necessary if Plaintiff Foley prevails on his other claims.


<sup>94</sup> See Appellant's Opening Brief at page 12.

recovery of such attorney fees and costs is appropriate pursuant to RCW 4.84.185 and/or CR 11 based on the record before the trial court.

The trial court should be affirmed.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of November, 2018.

**SNYDER LAW FIRM, LLC**



**KLAUS O. SNYDER**, WSB# 16195  
Attorney for Respondents



Kelly J. Faust Sovar (Nov 29, 2018)

**KELLY. J. FAUST SOVAR**, WSB# 38250  
Co-Appellate Attorney for Respondents

**CERTIFICATE OF TRANSMITTAL**

On this day, the undersigned sent to the Attorney of Record for Appellant and to the Court of Appeals of Washington, Div II, a copy of this document by ☐ U.S. Mail Postage prepaid ☐ Attorneys Messenger Service & ☒ Email

I certify under penalty of perjury the Laws of the State of Washington that the foregoing is true and correct.



**SUMNER, WA**    **NOV. 29, 2018**

Place

Date

Signed: **KLAUS O. SNYDER**